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IN THE SUPREME COURT OF THE UNITED STATES

No. 83-5849

SCOTT FRANKLIN CLINES,
JAMES WILLIAM HOLMES,
DARRYL V. RICHLEY and
MICHAEL RAY ORNDORFF — PETITIONERS

vs.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I.

WHETHER THE DENIAL OF SEVERANCE VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS?

II.

WHETHER THE ARKANSAS CAPITAL FELONY MURDER STATUTE AS APPLIED TO PETITIONERS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS?

III.

WHETHER THE USE OF A DEATH QUALIFIED JURY TO DECIDE THE GUILT AND PUNISHMENT OF PETITIONERS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS?

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OPINION BELOW

The opinion of the Arkansas Supreme Court affirming petitioners' convictions for capital felony murder and death sentences is reported at 280 Ark. 77 (Adv. Sheets, July 5, 1983). A copy of the opinion is included in petitioners' appendix, but respondent has submitted an additional copy of the opinion in its appendix because petitioners' copy is incomplete. Thus all references in this response are tc respondent's appendix unless otherwise noted.

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions and statutes are found in petitioners' brief at page 3.

STATEMENT OF THE CASE

Respondent concurs in petitioners' Statement of the Case but also refers the Court to the opinion of the Arkansas Supreme Court set forth in respondent's appendix.

REASONS FOR DENYING THE WRIT

I.

THE DENIAL OF SEVERANCE DID NOT VIOLATE PETITIONERS' RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

A.

PETITIONERS WERE NOT ENTITLED TO SEVERANCE AS A MATTER OF LAW.

Petitioners claim they were entitled to severance as a matter of right because the State was seeking the death penalty against them. Petitioners are remiss in their argument, however. Previously in Arkansas, when the State sought the death penalty, severance of defendants was mandatory. Vault v. Adkisson, 254 Ark. 75, 491 S.W.2d 609 (1973). As acknowledged by petitioners, Ark. R. Crim. P. 22.3, Ark. Stat. Ann. Vol. 4A (Repl. 1977) provides that severance of defendants in all cases lies within the sound discretion of the trial court. Petitioners' brief at p. 7. Rule 22.3(a) was promulgated in light of Bruton v. United States, 391 U.S. 123 (1968). Whether to grant severance is a matter lying within the sound discretion of the trial court and that ruling will not be reversed absent an abuse of that discretion. Hallman v. State, 264 Ark. 583, 575 S.W.2d 688 (1977); Legg v. State, 262 Ark. 583, 559 S.W.2d 22 (1979).

Strong public policy favors joint trial of all defendants where they are charged in a single indictment, are alleged to have participated in the same act or transactions, and where charges may be proved by the same evidence, although each defendant need not have participated in every act. United States v. Heck, 499 F.2d 778 (9th Cir. 1974); United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976); United States v. McPartlin, 595 F.2d 132 (7th Cir. 1979). Fed. R. Crim. P. 8(b); 13, 14. Severance is not required merely because evidence may be more damaging against one defendant. United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980). To establish prejudice, defendant must show more than that he had a better chance for acquittal and, if he claims that a separate trial would have permitted him to call as a witness his co-defendant, he must establish

that the co-defendant would testify and that testimony would be exculpatory. The jury must further be able to individualize the evidence against each defendant and thereby reach a fair determination of guilt. United States v. Anthony, 565 F.2d 533 (8th Cir. 1977) cert. denied, 434 U.S. 1079; United States v. Mayo, 646 F.2d 369 (9th Cir. 1981), cert denied, Dondrich v. United States, 102 S.Ct. 979; United States v. Phillips, 664 F. 2d 971 (5th Cir. 1981).

Respondent thus concludes petitioners are remiss in their argument that they were entitled to severance as a matter of right as the great weight of authority so indicates.

Finally, petitioners' argument that the General Assembly impermissibly delegated law making authority to the Arkansas Supreme Court too must also fail. The Arkansas Supreme Court rejected a similar contention in Jennings v. State, 276 Ark. 217, 218, 633 S.W.2d 373 (1982). The Court held that Ark. Stat. Ann. §§ 22-242 (Supp. 1980), the enabling provision, [Petitioners' Appendix D] "'merely recognizes and is harmonious with the Court's inherent powers rather than conferring an express power."' citing Miller v. State, 262 Ark. 223, 225, 555 S.W.2d 563 (1977). In Miller, it was noted that in Sibbach v. Wilson, 312 U.S. 1 (1924), this Court held that "the legislature's power to regulate practice and procedure may be exercised by granting courts the authority to establish rules not inconsistent with other statutes or the United States Constitution." Miller v. State, 262 Ark. at 225. Accordingly, petitioners' due process rights were not violated.

B.

NO PREJUDICIAL OUT-OF-COURT STATEMENTS WERE ADMITTED AT TRIAL, NOR WAS EXCULPATORY EVIDENCE EXCLUDED.

As discussed in Part A, supra, petitioners were not entitled to severance as a matter of right. Respondent likewise submits the trial court did not abuse its discretion in denying severance of defendants at trial.

Petitioners rely on Hallman & Martin v. State, 264 Ark. 900, 575 S.W.2d 688 (1978), but respondent contends the

"protective circumstances" considered there are not a mandatory prerequisite to a joint trial.

In the opinion below, the Arkansas Supreme Court considered the facts, supported by the record and concluded that (1) the petitioners' defenses were not antagonistic and that (2) all four petitioners planned and executed the robbery, expressly deliberating on murder as a possible consequence. A.9-10. The court further concluded that this case was factually distinguishable from McDaniel and Gookin v. State, 278 Ark. 631, 648 S.W.2d 57 (1983). Nor did Enmund v. Florida, ____U.S.____, 102 S.Ct. _____, 73 L.Ed.2d 1140 (1982) compel the conclusion that imposition of the death penalty was cruel and unusual punishment under the circumstances, since the blame for the death of the murder victim rested with near equality on all petitioners. A.6-8.

Thus, petitioners present virtually the same argument herein as was presented to the court below on appeal and there rejected. Although apparently contending that the decision of the court below is inconsistent with prior state law and with this Court decision in Enmund, petitioners' argument is not meritorious. There being no inconsistency in the holding below in the instant case with prior decisions, review by this Court is not necessary. Rule 17(b)(c), Rules of the United States Supreme Court.

C.

PETITIONERS WERE NOT DENIED DUE PROCESS OR EQUAL PROTECTION BECAUSE THEY WERE LIMITED TO TWELVE PEREMPTORY CHALLENGES.

In concluding that no error was committed in limiting the petitioners to twelve peremptory challanges pursuant to Ark. Stat. Ann. § 43-1922 (Supp. 1981), A.22, the Arkansas Supreme Court noted this Court's holding that there is no absolute right to peremptory challenges under the Constitution, citing Stilson v. United States, 250 U.S. 583 (1919). There, the Court found that the Constitution of the United States does not require the granting of peremptory challenges nor does it designate the number to be allowed. The Supreme Court concluded that peremptory challenges are privileges granted by

statute and that requiring the parties defendant to be treated as a single party for the purpose of peremptory challenges is not improper. See also, Schaefer v. United States, 251 U.S. 466 (1920); Holmes v. United States, 134 F.2d 125, 129 (8th Cir. 1943); and State v. Persinger, 382 P.2d 497, 500 (Wash. Sup. Ct. 1963), appeal dismissed, 376 U.S. 187. Accord, Hayes v. Missouri, 120 U.S. 68 (1886).

The petitioners assert that the peremptory challenge is a fundamental right and any state action which restricts or inhibits the exercise of that right must be closely scrutinized in accordance with Shapiro v. Thompson, 394 U.S. 618 (1964). This contention was specifically rejected in Martin v. State, 317 N.E.2d 430, 431-432 (Ind. Sup. Ct. 1974), cert. denied, 420 U.S. 911.

The fact that the present case is a capital case is insufficient to remove it from the approved statutory method of apportioning peremptory challenges. Consider People v. King, 49 Cal. Rptr. 562, 568-569 (1966), cert. denied, 385 U.S. 923, a capital case in which co-defendants were required to jointly exercise challenges. In People v. King, supra, the court held that peremptory challenges are a privilege, not a right, which must be exercised within limits imposed by the legislature. See also, State v. Rivenburgh, 355 P.2d 689 (Utah 1960), cert. denied, 368 U.S. 922, a capital case wherein a similar conclusion was reached.

The equal protection and due process arguments advanced by petitioners are not unique to capital cases, but are equally applicable any time co-defendants are required to jointly exercise peremptory challenges. Such arguments have been routinely rejected by the courts. Consider, State v. Rivenburgh, supra (Utah); Martin v. State, supra (Ind.); Sitarski v. New York, 358 F.Supp. 817 (W.D.N.Y. 1973); United States v. Stidham, 459 F.2d 297 (10th Cir. 1972); cert. denied, 409 U.S. 868; State v. Allen, 562 P.2d 632 (Wash. 1977). The "class" herein is certainly not suspect. Martin v. Indiana, supra, at 317 N.E.2d 431.

Finally, the ruling of the court below is consistent with its previous decisions upholding the method of apportioning peremptory challenges between co-defendants pursuant to Ark. Stat. Ann. § 43-1929 (Repl. 1977). A.22 Williams v. State, 267 Ark. 527, 593 S.W.2d 8 (1980); Lewis v. State, 220 Ark. 914, 251 S.W.2d 490 (1952); Hearne v. State, 121 Ark. 460, 181 S.W.2d 291 (1921).

Petitioners's constitutional rights were not abridged by being limited to twelve peremptory challenges and this Court should decline to review the issue.

D.

DENIAL OF SEVERANCE DID NOT CAUSE PETITIONERS TO BE SENTENCED JOINTLY, AND THUS DUE PROCESS AND THE PROHIBITION AGAINST ARBITRARY DEATH SENTENCES CONTAINED IN THE FOURTEENTH AND EIGHTH AMENDMENTS, WERE NOT VIOLATED.

As indicated in Subpart B, supra, the Arkansas Supreme Court considered the record of this appeal in light of this Court's holding in Enmund v. Florida, ____U.S.____, 102 S.Ct. _____, 73 L.Ed.2d 1140 (1982), considered the culpability of each petitioner and concluded the blame for the death of the murder victim was shared with near equality by all. A.8.

II.

THE ARKANSAS CAPITAL FELONY MURDER STATUTE IS CONSTITUTIONAL.

Petitioners first contend that Ark. Stat. Ann. § 41-1501 (Repl. 1977), this State's capital murder statute, is unconstitutional because it does not require the jury to consider the culpability of each individual defendant. (Petitioner's Appendix F-1) The Arkansas Supreme Court passed on the merits of this issue below, noting that it could decline to do so because petitioners did not object at trial to the capital murder instructions nor tender an instruction consistent with their view of the law, citing Schwindling v. State, 269 Ark. 388, 602 S.W.2d 639 (1980). The discussion of the court below finding and assessing the criminal acts and intent of each petitioner has previously been discussed in I, Subpart B, supra. See A.69.

In Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), the Supreme Court recognized Arkansas as being

a state whose capital murder statute "require[d] some culpable mental state with respect to homicide as a prerequisite to conviction for which the death penalty is authorized." 73 L.Ed.2d at 1147.

Arkansas has held that the quoted language is in the nature of a culpable mental state akin to intent. State v. Vowell, 276 Ark. 258, 260, 634 S.W.2d 118 (1982); Nolen v. State, 278 Ark. 17, 643 S.W.2d 257 (1982).

Moreover, as indicated in the Arkansas Supreme Court's opinion, the Arkansas capital murder statute does not mandatorily result in the imposition of the death penalty upon conviction. A.6.

It has previously been held that the capital murder statute does not require the mandatory imposition of the death penalty, recognizing the jury's flexibility in sentencing and the trial court's authority to modify the sentence imposed. Ruiz & Van Denton v. State, 273 Ark. 94, 104-106, 617 S.W.2d 6 (1981); Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980); Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977). Likewise, this Court has addressed the issue of the prosecutor's authority to waive the death penalty and found such to be valid as long as exercise of that authority is not based upon an unjustifiable standard such as race, religion or other arbitrary classification. Miller v. State, 269 Ark. 341, 352, 605 S.W.2d 430 (1980); Ruiz & Denton v. State, 275 Ark. 410, 412-414, 630 S.W.2d 44 (1982); Hill v. State, 278 Ark. 194, 197-198, 644 S.W. 2d 282 (1983). This position is consistent with this Court's position in Bordenkircher v. Hayes, 434 U.S. 359 (1978).

As noted by the opinion below, the petitioners' contention that the equal protection clause is violated because there are more men than women on death row in Arkansas was raised for the first time on appeal and rejected as conclusory. A.5.

In Cromwell v. State, 269 Ark. 104, 106-107, 598 S.W.2d 733 (1980), it was held that Arkansas' capital murder statute was not impermissibly vague because it employs language prohibiting the death of another "under circumstances manifesting an extreme

indifference to the value of human life," citing Martin v. State, 261 Ark. 80, 547 S.W.2d 81 (1977) where such language was clearly upheld. See also, Ruiz & Van Denton v. State, 273 Ark. 94, 617 S.W.2d 6 (1981).

Finally, the result reached below is not inconsistent with the Arkansas Supreme Court's previous holding in Henry v. State, 278 Ark. 478, 647 S.W.2d 419 (1983). In Henry, the evidence clearly indicated that Henry's co-defendant Britton fired the fatal shots that killed the victim. 278 Ark. at 485. In the instant case, the court below correctly determined that responsibility for the murder was shared by all petitioners. Thus, these holdings are not inconsistent.

III.

PETITIONERS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE USE OF A DEATH QUALIFIED JURY.

Respondent acknowledges the recent decision of Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark. 1983), which held that the Arkansas jury selection process in capital murder cases denied the accused trial by a jury representative of a cross section of the community and created juries that were conviction prone. Compare, Witherspoon v. Illinois, 391 U.S. 510 (1968). This position was taken in contravention of decisions by the Arkansas Supreme Court repeatedly rejecting similar contentions that such juries are conviction prone and not representative of a fair cross section of the community. Coble v. State, 274 Ark. 134, 140, 624 S.W.2d 421 (1981), cert. denied, ____ U.S.____; Miller v. State, 269 Ark. 341, 351, 605 S.W.2d 430 (1980), cert. denied, 450 U.S. 1035; Giles v. State, 261 Ark. 413, 426-427, 549 S.W.2d 479 (1977), cert. denied, 433 U.S. 894. The position of the court below on this issue was recently reaffirmed in Rector v. State, 280 Ark. 385 (Adv. Sheets, Oct. 17, 1983) where the position taken by the district court was outright rejected. Respondent notes that the Grigsby decision has been appealed to the Court of Appeals for the Eighth Circuit but has yet to be decided. Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980)

Thus, respondent asserts the issue has been prematurely presented for this Court's review since the issue may be resolved in a lower court.

On May 8, 1981, the trial court filed an order which summarized the action taken at an omnibus hearing. (T.4346) In such order, the court noted that any motions and supporting briefs challenging the death qualification of jurors should be filed withn 20 days of receipt of the order. On June 1, 1981, Richley and Clines filed motions challenging the death qualification of jurors. (T.73,75,85) Approximately 120 days beyond the deadline imposed by the court, Orndorff sought to join in the motion previously filed by Clines by submitting a letter to the trial court. (T.139) Respondent therefore contends that Orndorff and Holmes lack standing to contest the constitutionality of death qualifying a jury.

Moreover, although petitioners couch their argument in terms of several written studies which have considered that issue, no evidence was presented to the trial court in support of petitioners' motions below. It has previously been held that the death qualified jury issue may not be considered unless properly raised in state trial court. Hulsey v. Sargent, 550 F.Supp. 179 (E.D.Ark. 1981).

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. Respondent respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioners relief in their direct appeal. Therefore for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alice Ann Burns, Deputy Attorney General, do hereby certify that a copy of the above and foregoing pleading has been served on petitioners by placing a copy of same in the United States Mail, postage prepaid, this 23rd day of January, 1984, addressed to the following attorneys of record:

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RESPONDENT'S
APPENDIX

Hoyt Franklin CLINES, James William HOLMES, Darryl V. RICHLEY and Michael Ray ORNDORFF
v. STATE of Arkansas

CR 82-54

Supreme Court of Arkansas
Opinion delivered July 5, 1983

1. CRIMINAL LAW — CAPITAL FELONY MURDER DEFINED. — Capital murder occurs if a person, acting alone or with others, commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. [Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977).]
2. CONSTITUTIONAL LAW — CAPITAL MURDER STATUTE NOT VAGUE. — The Arkansas capital murder statute is not vague; in the definition of criminal offenses some generalization is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses.
3. APPEAL & ERROR — ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL WILL NOT BE CONSIDERED. — Where an argument is raised for the first time on appeal, it will not be considered.
4. JURY — JURY NOT BOUND TO RETURN DEATH SENTENCE. — Whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. [Ark. Stat. Ann. § 41-1302 (2) (c).]
5. CRIMINAL LAW — CAPITAL MURDER AND FIRST DEGREE MURDER STATUTES OVERLAP — JURY FREE TO CONSIDER BOTH. — Because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree.
6. CONSTITUTIONAL LAW — PROSECUTORIAL DISCRETION IN SEEKING DEATH PENALTY NOT ARBITRARY AND CAPRICIOUS. — Imposition of the death penalty is not arbitrary and capricious just because the prosecuting attorney is given discretionary power to waive the death penalty.
7. CONSTITUTIONAL LAW — DEATH PENALTY — WHEN IT IS CRUEL AND UNUSUAL PUNISHMENT. — Although death is cruel and

unusual punishment for one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence, and since the murder was plainly contemplated by the appellants, the blame for the murder rests with near equality on all of the appellants.

8. CRIMINAL PROCEDURE — SAFEGUARDS AGAINST ARBITRARY IMPOSITION OF THE DEATH PENALTY. — There are added safeguards in our system against the arbitrary imposition of the death penalty: the power of the trial court to reduce a death sentence to life imprisonment, and comparative review of every death case by the Supreme Court which has modified death sentences where they were imposed capriciously, where the culpability of co-felons was disproportionate or where death was unduly harsh under the circumstances.

9. CRIMINAL PROCEDURE — SEVERANCE IN CAPITAL CASES — DISCRETIONARY WITH TRIAL COURT. — Although defendants in capital cases were previously entitled to severance as a matter of right pursuant to Ark. Stat. Ann. § 43-1802 (Repl. 1977), A.R.Cr.P. Rule 22.3 superseded § 43-1802 and gives discretion to the trial court to try the defendants jointly in capital cases.

10. CRIMINAL PROCEDURE — SEVERANCE DISCRETIONARY WITH TRIAL COURT — CAREFULLY SCRUTINIZED. — Although severance of the defendants rests within the sound discretion of the trial court and such discretion is broad, it is to be exercised judiciously in capital cases, with careful scrutiny to be given to a number of elements which could affect the fairness of the trial.

11. CRIMINAL PROCEDURE — NO ABUSE OF DISCRETION TO REFUSE SEVERANCE. — The trial court did not abuse its discretion in refusing to grant separate trials where the defenses were not utterly antagonistic, the culpability was not distinctly disproportionate and nothing suggests that substantial injustice would result if these appellants were tried jointly.

12. CONSTITUTIONAL LAW — DEATH QUALIFIED JURY NOT UNCONSTITUTIONAL. — Death qualified juries are not unconstitutional.

13. JURY — SELECTION — TRIAL COURT IN BETTER POSITION TO EVALUATE ATTITUDE OF VENIREMEN. — Where the veniremen's answers were tentative or equivocal, the trial court is in a better position than the appellate court to gauge the attitude

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of the veniremen and decide whether each will weigh the evidence and, if appropriate, will consider all the penalties provided by law.

14. CRIMINAL PROCEDURE — JOINT TRIAL — EACH DEFENDANT IS NOT ENTITLED TO FULL ALLOTMENT OF PEREMPTORY CHALLENGES. — Where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all.
15. JURY — NO RIGHT TO PEREMPTORY CHALLENGES UNDER THE CONSTITUTION. — No absolute right to peremptory challenges exists under the constitution.
16. TRIAL — RECESSES AND SEQUESTRATION NOT AMENABLE TO INFLEXIBLE RULES. — Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar.
17. TRIAL — FIVE DAY RECESS NOT AN ABUSE OF DISCRETION. — When the trial court ordered a five day recess between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council, the trial judge did not abuse his discretion; the trial was commenced well in advance of the meeting, but moved at a slower pace than expected.
18. APPEAL & ERROR — POINT NOT CONSIDERED ON APPEAL IF PROPER OBJECTION NOT MADE BELOW. — A point will not be considered on appeal if a proper objection was not made below.
19. EVIDENCE — NO ERROR FOR TRIAL COURT TO ADMIT STATEMENT OF WITNESS. — The trial court did not err in admitting into evidence a statement by a witness that one of the defendants told him that he had been involved in "stealing and robbing," since the statement was admitted with an admonition to the jury in accordance with the purposes of Ark. R. Evid. 404 (b).
20. EVIDENCE — NO CLEAR ERROR SHOWN BY COURT ALLOWING QUESTION TO WITNESS ABOUT PRIOR ROBBERY. — The trial court was not clearly wrong in allowing one defense attorney to ask an alibi witness if her husband was facing charges for robbery committed the night before the murder and later allowing the state to go into greater detail when the husband took the stand; whether the questions were asked to discredit the witnesses or may have been intended for the purpose of proving identity, opportunity, intent, preparation or absence of mistake, the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value and

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the prejudicial aspect is not so obvious that the appellate court can say the trial court was clearly wrong.

21. CRIMINAL PROCEDURE — ACCOMPLICE TESTIMONY AS TO COMMISSION OF PRIOR VIOLENT CRIMES IN SENTENCING PHASE OF CAPITAL CASE. — Although Ark. Stat. Ann. § 43-2116 provides that a *conviction* cannot be had in any case upon the testimony of an accomplice unless there is corroboration by other evidence, that is not the rule when the state is proving aggravating circumstances during the sentencing phase of a capital murder case since the state is trying to prove that a crime of violence was *committed*.

22. CRIMINAL LAW — AGGRAVATING AND MITIGATING CIRCUMSTANCES — STANDARD OF PROOF. — The same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime; if there is evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

23. TRIAL — OBJECTIONS MUST BE TIMELY — GRANT MISTRIAL ONLY IF TRIAL CANNOT FAIRLY CONTINUE. — Objections must be timely, and mistrials should be declared *only* when the trial court is certain the trial cannot, in fairness, continue.

24. APPEAL & ERROR — DOCUMENTS SHOULD BE ABSTRACTED. — Where an argument on appeal is based on a search warrant and affidavit, the rules require that they be properly abstracted.

Appeal from Benton Circuit Court; *William H. Enfield*, Judge; affirmed.

Marshall N. Carlisle; Donald R. Huffman, Public Defender; *Priscilla Karen Pope;* and *Thomas J. Tucker*, for appellants.

Steve Clark, Atty. Gen., by: *Dennis R. Molock* and *Alice Ann Burns*, Asst. Attys. Gen., for appellee.

STEELE HAYS, Justice. These four appellants were jointly tried and convicted of the January 8, 1981 capital murder of Don Lehman, a Rogers householder, and of the aggravated robbery of his wife and daughter. They were sentenced to death by electrocution on the capital murder charge and to life sentences on the two aggravated robbery

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charges. On appeal they allege a number of errors of law and procedure as grounds for reversal. Finding no error, we affirm the convictions and the sentences imposed.

I.

THE TRIAL COURT ERRED IN FINDING THE ARKANSAS CAPITAL MURDER STATUTE CONSTITUTIONAL.

Appellants make a four-fold attack on the constitutionality of the Arkansas felony murder statute, Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977), which provides that capital murder occurs if a person, acting alone or with others, commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Appellants argue that the statute is vague and overbroad; that it denies equal protection of the law inasmuch as there are currently twenty-three men, but no women, on death row; that the imposition of the death penalty is arbitrary and capricious because the prosecuting attorney is given discretionary power to waive the death penalty and because the jury must return a death verdict if they find aggravating circumstances outweigh mitigating circumstances; and finally that our statutory scheme does not require the jury to consider the culpability of each individual defendant.

The vagueness argument has been raised and answered more than once. In *Cromwell* v. *State*, 269 Ark. 104, 598 S.W.2d 733 (1980), we pointed out that in the definition of criminal offenses some generalization is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses. (See *Cromwell* at p. 107).

The claim that the equal protection clause of the constitution is offended because men are given the death penalty disproportionately to women is raised initially on appeal and, beyond that, is supported by argument alone.

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We disagree that juries are bound under our statutory scheme to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances. We have pointed out in several cases that whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. (See *Williams* v. *State*, 274 Ark. 9, 621 S.W.2d 686 [1981] and Ark. Stat. Ann. § 41-1302 [2] [c]). Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. *Wilson* v. *State*, 271 Ark. 682, 611 S.W.2d 739 (1981). This jury had that option.

The argument that prosecutorial discretion in seeking the death penalty is arbitrary and capricious has been dealt with by the Supreme Court of the United States (*Bordenkircher* v. *Hayes*, 434 U.S. 359 [1978]); and by us (*Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 [1980]). It needs no further review.

The claim that our statutory scheme does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, might be disposed of on procedural grounds, as the argument was not clearly raised below, i.e. we find no objection to the capital murder instructions, nor did the appellants tender to the trial court an instruction consistent with their view of the law. *Schwindling* v. *State*, 269 Ark. 388, 602 S.W.2d 639 (1980). However, we choose to consider the merits of the argument.

Appellants cite *Enmund* v. *Florida*, ___ U.S. ___, ___ S. Ct. ___, 73 L. Ed. 2d 1140 (1982). There, the Supreme Court held that death was a cruel and unusual punishment for one who had participated in a robbery during which murders were committed, but was not present at the killings and did not intend that the victims be killed. The court noted that the record supported no more than an inference that Enmund, the petitioner, was the person waiting in a car near

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the scene of a robbery. Two others had gone to the rear of a nearby farmhouse and, on a pretext of having car trouble, coaxed the victim outside to rob him. When the victim called for help his wife came out and shot one of the robbers. The two victims were killed in a gun battle and the robbers fled with their money to a waiting car.

Relying on the Eighth Amendment, the court held that one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, is not subject to the death penalty. A Florida jury had found Enmund and a co-defendant guilty and recommended the death penalty for both defendants, which the trial court imposed. Acknowledging the absence of any direct evidence that Enmund was present at the killings, the Supreme Court of Florida affirmed, explaining that the interaction of the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felons. As it did with the death penalty for rape (see *Coker* v. *Georgia*, 433 U.S. 584 [1977]), the court reasoned that an overwhelming number of states and of American juries would repudiate the death penalty for crimes such as Enmund's.

Significant comments are in the opinion, first, that there was no evidence that Enmund had any intention of participating in, or facilitating, a murder and, second, the court emphasized that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Here, a number of distinguishing factors immediately appear. At about 9:45 p.m., after he and his family had retired for the evening, Don Lehman answered a knock at his front door. He asked who was there and someone answered "David." His daughter, Vickie, also responding to the knocking, said as her father unlocked the door the four appellants, masked and armed, burst into the room with such force that her father was knocked backward off his feet and the doorknob of the front door was jammed through a closet door behind. Two or three of the appellants struggled with her father toward the

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bedroom, where Mr. Lehman was wrestled onto the bed and a fatal shot to the head and one to the abdomen were delivered.

There was direct evidence from more than one source that appellants had discussed among themselves the necessity of murder if they met resistance; at least two of the appellants were armed with pistols, perhaps three of them, and the fourth with a lethal weapon fashioned from a metal chain. All four wore ski masks and all four burst into the Lehman home when the latch was opened. The proceeds, some $1,200, were presumably divided to the appellants' liking. It must be noted, too, that Lehman was given no opportunity to yield, he was immediately attacked by appellants, sustaining blows to his head and face from the metal chain and a mortal wound to the chest before reaching the bedroom.

Although perhaps only two of the appellants were in the bedroom when Mr. Lehman was killed, it cannot be ignored that when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence. We think the likelihood of a homicide under the circumstances is so substantial as to bring this case clearly within the quoted exception of the *Enmund* decision, on those circumstances alone. Added to that is the evidence that murder was plainly contemplated by the appellants. We conclude the blame for Don Lehman's murder rests with near equality on all of the appellants.

As a final response to this phase of the argument, we point out that there are added safeguards in our system against the arbitrary imposition of the death penalty. In *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), we noted the power of the trial court to reduce a death sentence to life imprisonment and in that opinion we committed this court to a policy of comparative review, by examining the death penalty in every case on a comparable basis. We have demonstrated our readiness to modify the death sentence

where it is imposed capriciously (see *Sumlin* v. *State*, 273 Ark. 185, 617 S.W.2d 372 [1981]), or where the culpability of co-felons is disproportionate (see *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 [1983]), or where death is unduly harsh under the circumstances (*Neal* v. *State*, 274 Ark. 217, 623 S.W.2d 191 [1981] and *Giles* v. *State*, 261 Ark. 413, 549 S.W.2d 479 [1977]).

We are not overlooking the suggestion that Michael Orndorff's participation in the crime was half-hearted; that he may have asked to be taken home as the appellants were leaving the Baker residence; and that after the shooting he disclaimed any wish to be involved in a murder. But the jury unanimously rejected as a mitigating factor that any appellant played a minor role. Too, Orndorff's request to be taken home may have been due to Steve Baker's having declined to go along, rather than because of any compunctions over the undertaking. And his belated comment that he didn't want to be a part of a murder must be judged from the standpoint that it came *after* the fact and against the uncontradicted proof that he burst into the Lehman home along with the others, masked and intent on robbing, killing, if need be, anyone who resisted. We need not repeat what we have already said about the shared culpability for Don Lehman's death under the circumstances of this case. To selectively exclude this appellant from the penalty imposed by the jury for conduct readily assumed by all of them would be to arbitrarily excuse him from the predictable consequences of his own actions, consequences which the proof showed he expressly recognized.

II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A SEPARATE TRIAL FOR EACH DEFENDANT.

Prior to the adoption of the Arkansas Rules of Criminal Procedure in 1976, defendants in capital cases were entitled to severance as a matter of right pursuant to Ark. Stat. Ann. § 43-1802 (Repl. 1977). However, A.R.Cr.P. Rule 22.3 superseded § 43-1802 and gives discretion to the trial court to try

the defendants jointly in capital cases. *Hallman and Martin v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

Appellants submit that our recent decision in *McDaniel and Gookin v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983), requires a reversal of this case, but the argument cannot be sustained. There are fundamental differences between the two cases and in *McDaniel* we did not disturb the rule that severance of defendants rests within the sound discretion of the trial court. We pointed out that such discretion is broad, though to be exercised judiciously in capital cases, with careful scrutiny to be given to a number of elements which could affect the fairness of the trial. (See *McDaniel and Gookin v. State*, page 638). In *McDaniel*, the defenses of the defendants were utterly antagonistic, each defendant claiming the murder was committed unexpectedly by the other. No such similarity exists here. It is argued that the defenses in this case are antagonistic, but that claim cannot be supported. We find no effort among the defendants to point to another defendant as the murderer; the proof on behalf of each defendant (only one of whom testified) was aimed for the most part at proving he was not in the bedroom, where the murder occurred. These defenses are not in the least antagonistic in the same sense as in *McDaniel*.

The final and essential difference is that the *McDaniel* case had the added element that where culpability was distinctly disproportionate, the jury was admittedly unable to decide which of the two defendants committed a heinous act, resulting in two defendants being convicted of a capital crime for which only one may have been guilty. Whereas here, there is substantial evidence, indeed overwhelming evidence, that all four appellants planned and executed a robbery, expressly deliberating on murder as a possible consequence. Nothing in this record suggests that for these appellants to be tried jointly resulted in substantial injustice and we find no abuse of discretion in the trial court's refusal to grant separate trials.

III.

THE USE OF A DEATH QUALIFIED JURY IN THE INSTANT CASE DENIED THE APPEL-

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LANTS AN IMPARTIAL JURY ON THE ISSUES OF GUILT AND PUNISHMENT AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The gist of this argument is that when those members of a jury panel holding religious or conscientious scruples against capital punishment are eliminated, the cross-section of the population which remains is not impartial and unbiased on the issues of guilt and punishment. They are, it is urged, favorable to the prosecution and, hence, guilt prone. The argument is not new and needs no reiteration. It has been considered and rejected here as well as in the Supreme Court of the United States. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

IV.

THE JURY SELECTED IN THE INSTANT CASE WAS NOT SELECTED IN ACCORDANCE WITH THE STANDARD PRESCRIBED IN *WITHERSPOON* AND *HOBBS*.

The *Witherspoon* rule, as interpreted in *Hobbs* v. *State*, 273 Ark. 125, 617 S.W.2d 347 (1981) permits the exclusion of persons as prospective jurors *only* if they irrevocably oppose or favor the death penalty regardless of the evidence. Appellants insist that two of the veniremen, Mrs. Kaiser and Mrs. Dick, should not have been excused for cause because of their uncertainty as to capital punishment and Mr. Harley Wood, who showed some preference for it, should have been excused for cause.

We have examined the questions asked in voir dire and the responses given and, typically, no clear conclusion can be drawn. The answers are tentative or equivocal, and the trial court is in a better position than we are to gauge the attitude of the veniremen and decide whether each will weigh the evidence and, if appropriate, will consider all the penalties provided by law. We cannot say his discretion was used wrongly in any instance complained of. *Hulsey* v.

State, 268 Ark. 312, 595 S.W.2d 934 (1980); *McCree* v. *State*, 266 Ark. 465, 585 S.W.2d 938 (1979).

V.

THE TRIAL COURT ERRED IN LIMITING THE APPELLANTS TO A TOTAL OF TWELVE PEREMPTORY CHALLENGES.

The trial court limited the four defendants to a total of twelve peremptory challenges, which they claim is error. We have held in three cases that where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all. *Williams* v. *State*, 267 Ark. 527, 593 S.W.2d 8 (1979); *Lewis* v. *State*, 220 Ark. 914, 251 S.W.2d 490 (1952); *Hearne* v. *State*, 121 Ark. 460, 181 S.W.2d 291 (1915).

No absolute right to peremptory challenges exists under the constitution, *see Stilson* v. *United States*, 250 U.S. 583 (1919), and we see no prejudice resulting from the position we have taken in the earlier decisions. The right to challenge a prospective juror on peremptory grounds may be exercised simply because counsel has reservations that certain groups might be skeptical of its theory of the case; it is a very general response and such criteria as occupation, education, age, residence, social background, sex, and even facial expression, may influence its use, depending on the nature of the case. But ordinarily these considerations are applicable to the defendants as a whole and not individually. Here, it appears the peremptory challenges were exercised collectively by the defense, as might be expected, and no argument is offered that for a specific reason one prospective juror was objectionable to one of the defendants, though not to the others. We adhere to our holding in *Williams* v. *State*, *supra*.

VI.

CALLING A FIVE DAY RECESS AT THE CLOSE OF TESTIMONY WAS AN ABUSE OF THE COURT'S DISCRETION.

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Appellants allege that it was an abuse of discretion for the trial court to order a five day recess as the trial was nearing a close. The recess occurred, evidently, between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council. The trial seems to have commenced well in advance of the meeting, but moved at a slower pace than expected. Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar. We see no reason why it would work to the appellants' greater prejudice to recess from Wednesday to Monday, than from Friday to Monday, as often occurs in trials. We find no abuse of discretion.

VII.

IT WAS ERROR FOR THE JURY TO FIND THE AGGRAVATING CIRCUMSTANCE THAT, "IN THE COMMISSION OF THE CAPITAL MURDER, EACH OF THE APPELLANTS KNOWINGLY CREATED A GREAT RISK OF DEATH TO A PERSON OTHER THAN THE VICTIM."

Citing *Williams* v. *State*, 274 Ark. 9, 621 S.W.2d 686 (1981), appellants contend that because Vickie Lehman and Virginia Lehman were victims of the underlying felony of aggravated robbery to the capital murder of Don Lehman, the evidence will not warrant a finding as an aggravating circumstance that appellants knowingly created a great risk of death to a person other than the victim. Appellants assert that *Williams* v. *State* supports the argument, but fail to explain how. The holding there has no particular relevance to this case. Williams' death sentence was reduced because one of the aggravating circumstances found by the jury, commission of a prior felony, did not involve violence as required by Ark. Stat. Ann. § 41-1303 (Repl. 1977). The decision also holds that where a jury finds no mitigating circumstances and three aggravating circumstances, one of which is erroneous, we will not regard the error as harmless simply because two aggravating circumstances remain, as

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we are not in a position to speculate as to what a jury would do on a finding of two aggravating factors instead of three.

The appellee submits that this point was not preserved by an objection to the instructions or to the verdict forms. Without implying that the point is otherwise meritorious, we decline to consider it for the lack of proper objections.

VIII.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AND ACTS AGAINST APPELLANTS CLINES AND ORNDORFF.

Mrs. Tammy Baker was called by the state to prove that the appellants had been at her home the evening of the Lehman murder, drinking beer and playing cards with her husband, Steve Baker. She said when she answered the door the four appellants were there, that one was wearing a ski mask and stuck a gun in her face. She was ordered to "stick 'em up", before realizing that a joke was being played. The four stayed until about 9:30 p.m. and she overheard discussions involving the robbery of someone who lived nearby.

On cross-examination she was asked by counsel for one of the defendants, Clines, whether her husband was then facing charges of robbery committed the night before the Lehman crime. She said he was and was then asked if any of the appellants were involved and she said Orndorff and Clines were. Orndorff's objections to this line of questioning were overruled and when Steve Baker followed his wife to the stand the state was permitted to go into the incident in greater detail.

Appellants Clines and Orndorff complain that the admission of this evidence, as well as a statement by Billy Weaver that Darrell Richley told him he was the one who shot Don Lehman, that he had been involved in "stealing and robbing," violate the rule against admitting evidence of prior bad acts, citing *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). But the Weaver comment was admitted

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with an admonition to the jury in accordance with the purposes of Rule 404 (b), Uniform Rules of Evidence, and the Baker testimony has to be examined in light of the fact that it was Clines' lawyer who pointedly asked the questions that brought the evidence into the trial. Whether the object was to discredit Tammy and Steve Baker's testimony by showing that Baker was charged with similar conduct is speculation, but we are not persuaded that reversible error occurred. It is entirely possible that the evidence would have been received by the trial court under Rule 404 (b) had it been offered for the purpose of proving identity, opportunity, intent, preparation, or absence of mistake. Certainly the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value. The prejudicial aspect is not so obvious that we can say the court was clearly wrong.

IX.

IT WAS ERROR FOR THE COURT TO ALLOW THE JURY, IN THE SENTENCING PHASE, TO FIND APPELLANTS CLINES AND ORNDORFF HAD "PREVIOUSLY COMMITTED ANOTHER FELONY, AN ELEMENT OF WHICH WAS THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON OR CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON" ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

After the appellants' guilt had been established and the penalty phase of the trial was in progress the state was permitted to prove one of the seven aggravating circumstances listed in Ark. Stat. Ann. § 41-1303 (Repl. 1977) by the testimony of Steve Baker that he, Clines and Orndorff had previously committed another felony by the use or threat of violence. Baker said the three of them robbed Barry Cobbs and Tim Pettyjohn at gunpoint on January 7, 1981.

Appellants charge that since Steve Baker was an accomplice in the alleged robbery the penalty procedure violated the rule incorporated in Ark. Stat. Ann. § 43-2116,

that a conviction cannot be had in any case upon the testimony of an accomplice unless there is corroboration by other evidence. As Steve Baker's testimony was not corroborated, appellants claim that error resulted. The argument cannot be sustained, if for no other reason than the fact that § 43-2116 deals with grounds for *conviction,* whereas § 41-1303 deals with proving that a crime of violence was previously *committed.* Beyond that, in *Miller* v. *State, supra,* we held that the same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. (*Miller* at p. 355). We said that if there was evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

X.

THE TRIAL COURT ERRED IN ADMITTING THE TENNIS SHOES OF THE APPELLANT CLINES.

We need not delay unduly with the issue raised by this argument, as the admission of the evidence itself was of little or no consequence. An investigating officer testified that he took an impression of a foot print from a flower bed of the Lehman home; that there was a high degree of probability that it matched Hoyt Clines' tennis shoe, however, he said it was impossible to be absolutely certain. But Clines' presence at the scene in company with the other appellants was amply evidenced by other proof and no objection to this evidence was offered unti the trial, as required by A.R.Cr.P. Rule 16.2.

XI.

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL FOR TESTIMONY CONCERNING IMPLICATING OUT-OF-COURT STATEMENTS OF A CO-DEFENDANT, DARRYL V. RICHLEY, REGARDING APPELLANT CLINES.

Freddie Baker was called by the state to prove that Darryl Richley came to his home a day or two after the crime

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involving the Lehman family to ask his help in selling the guns taken from the Lehman home. Richley, he said, talked about his part in the murder, and told him four of them went to the door with ski masks and "busted on in", that one of the four started whipping Lehman with a motor chain belt, who made a break for the bedroom "and the guy pulled his mask off and kept hitting him. He said he got on the bed and that [Richley] shot him and said the guy kept going for a gun above the bed and he said he put the gun up to his head and shot him." The questioning continued at length, with no other reference to the removal of a mask, and not until the state fully completed its interrogation was any objection made. At that point counsel for Hoyt Clines moved for a mistrial on the grounds that there was previous testimony that it was Clines who had removed his mask and hence Clines was deprived of his right to confront opposing witnesses. This argument lacks merit, as objections must be timely, *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981), and mistrials should be declared *only* when the trial court is certain the trial cannot, in fairness, continue. *Floyd* v. *State*, 278 Ark. 86, 643 S.W.2d 555 (1982).

XII.

THE EVIDENCE OBTAINED FROM THE SEARCH OF APPELLANT RICHLEY'S CAR AND APARTMENT SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE AND THE CONSENT TO SEARCH GIVEN BY RICHLEY WAS NOT GIVEN VOLUNTARILY.

Appellant Richley urges that the affidavit for the search warrant was deficient in that no underlying circumstances for the affiant's conclusions were stated. He also argues that his consent was not voluntary. However, the search warrant and affidavit are not abstracted, as required by our rules, and the trial court found the appellant did give a lawful consent to the search. An independent determination of that issue has been made on review and we are satisfied the trial court's finding was entirely consistent with the evidence, particularly in view of Richley's testimony.

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Finally, under A.R.Cr.P. Rule 36.24, and our Rule 11 (f), we find the treatment of other objections of appellants which were overruled, as well as rulings adverse to appellants, do not constitute reversible error. On a comparative basis we are not disposed to say the death penalty in this case is so wantonly, arbitrarily or freakishly imposed, or so excessive in relation to the crime, that we are compelled to modify the verdicts. There was sufficient evidence to support the findings of aggravating circumstances which were not outweighed by mitigating circumstances. We are satisfied the jury's verdict was relatively free of passion or prejudice. Accordingly, the judgments and sentences are affirmed.

DUDLEY, J., concurs in part, dissents in part.

PURTLE, J., dissents.

ROBERT H. DUDLEY, Justice, concurring in part, dissenting in part. The State adduced overwhelming evidence that the four appellants were guilty of jointly committing a capital murder and two robberies. Their individual defenses were not mutually antagonistic. Although the charges were joined and the appellants were jointly tried, the appellants as well as the State were afforded a just and fair proceeding through the accusatorial phase of the bifurcated capital murder trial.

However, that holding does not mandate the conclusion that the due process protections were sufficiently afforded at the joint sentencing phase of the capital murder trial. The two phases of the bifurcated trial serve vastly different purposes. The essence of the accusatorial phase is the formal adversary presentation of evidence relative to guilt. The adversary concept places the State and the accused on an equal footing and so, in fairness to the State, joint trials are oftentimes required through this stage. Markedly different, the essence of the sentencing phase is the search for relevant information to choose which of the two penalties, life without parole or death, is appropriate for the person already found guilty. This second phase search for information is not based upon the same adversary concept. Our applicable statute provides that mitigating circumstances

may be presented regardless of their admissibility under the rules of evidence while aggravating circumstances may be presented only when they are admissible under the rules of evidence. Ark. Stat. Ann. § 41-1304 (4) (Repl. 1977). The underlying reason for this is that the penalty of death is qualitatively different from all other punishments.

When the death penalty is sought, justice demands individual, not joint, sentencing. It is for this same reason that mandatory death sentences for particular crimes have been declared unconstitutional. *Gregg* v. *Georgia*, 428 U.S. 153 (1976). It is only after a structured exercise of discretion which guarantees individualized sentencing that the death sentence may be imposed. *Proffitt* v. *Florida*, 428 U.S. 242 (1976); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). Accordingly, after a finding of guilt of capital murder, juries in this State may impose a sentence of death only after considering aggravating and mitigating circumstances. Ark. Stat. Ann. §§ 41-1301 & 1302 (Repl. 1977). Aggravating circumstances are principally related to the personal history of the individual defendant and not the nature of the crime committed. Ark. Stat. Ann. § 41-1303 (Repl. 1977). Mitigating circumstances are totally related to the personal background of the defendant. *Id.* Individualized sentencing requires structured detailed consideration of the personal history of the guilty person before the death sentence may be imposed. Any impediment to that individualized exercise of discretion is violative of the protection of due process.

The clear issue is whether the joint sentencing procedure used in this case afforded each appellant the structured and detailed consideration of his individual background which is required before the sentence of death may be imposed. Surely no one can doubt that when the jury was sent out of the courtroom to fix the punishment for four equally guilty persons at one sitting, that after fixing the penalty for the first three at death, there was a great reluctance to give the fourth a lesser sentence. Such reluctance alone might arbitrarily mandate a fourth death penalty for the particular crime regardless of the guilty person's personal history. This impediment to the in-

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dividual exercise of discretion violated due process and the prohibition against arbitrary death sentences.

Such a scenario may well have occurred in the case at bar. In the sentencing phase appellant Clines was shown to have pleaded guilty in 1978 to burglary, a non-violent crime. No other convictions or felonious actions were shown to have been committed by him during this stage of the trial. The only other proof of a prior bad action, for which there was no conviction, came during the accusatorial phase of the trial when an accomplice gave uncorroborated testimony on a collateral matter. Yet, he, took was given the death sentence.

For this reason I dissent from that part of the well written majority opinion which affirms the joint proceeding to fix the punishments at death. I concur in that part of the opinion affirming the life sentences for the aggravated robberies.

JOHN I. PURTLE, Justice, dissenting. I believe at least one of the appellants, Michael Orndorff, was prejudiced by the trial court's refusal to give him a separate trial. To grant him a separate trial would have in no way selectively excluded him from culpability in regard to the crime for which he was convicted. In fact it seems to me that holding him to trial with the actual murderers practically insured his conviction. Guilt by association is a common human error and in this case I have no doubt it played a big part in the minds of the jury who meted out identical convictions and uniform penalties to all four appellants.

When each of the appellants attempted to place himself outside the bedroom where decedent was shot the result was that each defendant put before the same jury a defense inconsistent with the other defendants' defenses.

The majority opinion seems to infer some type of guilt from some of the appellants' failure to testify. If the trial court did this we would vote unanimously to reverse and remand. The trial court should have granted a severance.

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A total of twelve peremptory challenges were allowed the four defendants. One of them did not get to exercise a single peremptory challenge. Had they been tried separately each would have been allowed twelve challenges. Therefore, these appellants were denied rights which are extended to others tried separately on identical charges. There is nothing to prevent a trial judge from allowing more than twelve peremptory challenges if fairness and impartiality demand it.

Furthermore, it was clearly prejudicial to allow evidence of crimes for which the appellants had not been convicted even though this was during the sentencing phase of the bifurcated trial. What happened to the old law that held every individual is presumed innocent? Soon it will be legal for the state to charge an accused of spurious crimes in order to help secure a conviction. For all we know none of the appellants were or will ever be found to have committed the alleged crime which was used during the sentencing phase.

I am still of the opinion that a death qualified jury is not comprised of a cross-section of the population as required by the Constitutions of Arkansas and the United States. It appears to me that there is a misunderstanding of the *Witherspoon* doctrine when prospective jurors are excluded because of religious or moral scruples against the death penalty. Perhaps some member or members of this very court have religious or moral scruples against the death sentence, yet we affirm such sentences if we find no reversible error. One who does not believe in the death sentence may honestly and conscientiously vote for such a sentence in upholding the law. For these reasons I must dissent to the majority opinion.

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43-1922. Peremptory challenges for defendant. -- The defendant shall be entitled to twelve [12] peremptory challenges in prosecutions for offenses punishable by death or life imprsonment, to eight [8] peremptory challenges in all other prosecutions for felony, and to three [3] peremptory challenges in prosecutions for misdemeanor[s]. [Init.Meas.1936, No. 3, § 18, Acts 1937, p. 1384; Pope's Dig., § 3998.]

43-1929. Challenges by several defendants -- When several defendants are tried together, the challenge of any one of the defendants shall be the challenge of all. [Crim. Code, §200; C. & M Dig., § 3169; Pope's Dig., § 4005.]